UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH & WELFAREAND PENSION FUNDS

AND Case 13-CA-277915

HEALTH CARE, PROFESSIONAL, TECHNICAL, OFFICE, WAREHOUSE AND MAIL ORDER EMPLOYEES' UNION, LOCAL 743, AFFILIATEDWITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Liz Cortez, Esq.
Counsel for the General Counsel

Brendan Crowley, Esq.
for Charging Party Teamsters 743

Charles Lee, Esq. and Albert Madden, Esq.
for Respondent Central States

DECISION

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE: I heard this matter via Zoom videoconference technology on May 2 and 3, 2022. The First Amended Complaint alleges that, effective January 1, 2021, Respondent Central States, Southeast and Southwest Areas Health & Welfare and Pension Funds (Respondent) changed the schedules of the salaried bargaining unit employees despite the demand to bargain over the change and the effects of the change from the Health Care, Professional, Technical, Office, Warehouse and Mail Order Employees' Union, Local 743, affiliated with the International Brotherhood of Teamsters (Local 743). Respondent denies all material allegations.

Most of the facts are undisputed with only a few exceptions. The differences regarding the facts are limited to the interpretation of the facts for a request to bargain and one conversation between the parties on December 15, 2021. Throughout the hearing the parties disagreed on the legal issue of whether Local 743 could bargain about Respondent's schedule change or its effect under the collective-bargaining agreement's management rights clause. Based upon observation of the witnesses and careful review of the transcript,[1] exhibits, and briefs, I make the following

[1] The abbreviations used throughout this decision are: Tr. for Transcript; Jt. Exh. for Joint Exhibit; GC Exh. for General Counsel Exhibit; R. Exh. for Respondent Exhibit; GC Br. for General Counsel Brief; R. Br. for Respondent Brief; and, U Br. for Local 743 Brief. The transcript contains an error, to be corrected to: "611 seeing" should be "611(c)ing" (Tr. 13.).

FINDINGS OF FACT

I. PROCEDURAL INFORMATION

On June 1, 2021, Local 743 filed the charge in Case 13-CA-277915, a copy of which was served upon Respondent by regular mail on June 2, 2021. Counsel for the General Counsel (General Counsel) issued its complaint and first amended complaint on August 25, 2021 and February 4, 2022 respectively. Respondent filed timely answers. On April 13, 2022, General Counsel served Respondent with an erratum to the complaint, which Respondent denied on the record. The hearing was held via Zoom videoconference technology on May 2, 2022.[2]

II. JURISDICTION

Respondent admits, and I find, that Respondent, with an office and place of business in Chicago, Illinois, has been engaged as a multi-employer fund for the administration of health and pension plans located throughout the United States. In conducting its operations during the 12-month period ending December 31, 2020, Respondent provided services valued in excess of $50,000 to employees of employers that are directly engaged in interstate commerce. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Scott Robbins is Respondent's Director of Human Resources, a position that includes responsibility for labor relations and negotiations with Local 743.

Respondent admits, and I find, Local 743 has been a labor organization within the meaning of Section 2(5) of the Act.

III. BARGAINING RELATIONSHIP BETWEEN RESPONDENT AND LOCAL 743

Respondent and Local 743 have been engaged in collective bargaining for 2 units. The first unit is comprised of hourly employees (Hourly Unit) and has maintained a collective bargaining relationship with Respondent since the 1970s. Respondent and the Hourly Unit have had consecutive collective-bargaining agreements over the years.

The second unit, the Salaried Unit, came into existence in 1997. (Tr. 87.) The Salaried Unit originally was comprised of approximately 10 field representatives. In 2000, the information technology employees[3] joined the Salaried Unit. Now the Salaried Unit is comprised of 90 to 100 employees: 10 employees who are field service representatives and the remainder work in the information technology section. (Tr. 86-87.)

The parties have maintained a collective-bargaining relationship for this unit since 1997. The most recent collective-bargaining agreement has been in effect from July 1, 2018 to June 30, 2024 and therefore is active during the course of these events. The agreement identifies the included positions in the Salaried Unit:

> Field Service Representative, Senior Field Representative, Marketing Representative, Service Representative, Field Service Analyst, Senior Field Service Analyst, Communications Analyst, Lead Communications Analyst, Sr.

[2] Many thanks to Deputy Alisa Jones for technical assistance during the hearing.

[3] The information technology employees are called Central Technology Services (CTS). (Tr. 86.) However, for ease of understanding, I refer to these employees as information technology.

> Communications Analyst, Voice Analyst, Senior Voice Analyst, Cost Control Analyst, Operations Analyst, PC User Liaison/Trainer, PC/LAN Systems Specialist, Control Analyst, Lead Control Analyst, Senior Control Analyst, Senior Production Support Coordinator, Business Support Analyst, PC/LAN Support Administrator, Senior PC/LAN Systems Specialist, Lead PC/LAN Systems Specialist, Programmer Analyst, Database Analyst, Lead Operations Analyst, Lead Programmer Analyst, Lead Voice Communication Analyst, Senior Database Analyst, Senior Data Administrator, Systems Programmer, Senior Programmer Analyst, Senior Systems Programmer, Lead Systems Programmer, Senior Business Support Analyst, Lead Business Support Analyst, Lead Database Administrator, Lead Database Analyst, Lead PC/LAN Support Administrator, Senior Operations Analyst, Union Service Teamleader, Information Systems Analyst, Net Developer, Senior Digital Solutions Engineer, IT Financial Analyst, Digital Solutions Engineer, Lead End User Technology Engineer, Lead Information Security Analyst, Senior Security Risk Analyst, Lead Network Engineer, Lead Systems Engineer, Lead UC Engineer, Lead Web Developer, Network Operations Specialist, Senior Net Developer, Senior Business Analyst, Senior End User Technology Engineer, Developer/Analyst, Senior Process Improvement Analyst, Senior Quality Assurance Analyst, Senior Service Desk Support Analyst, Senior Web Developer, Web Developer/ QA Analyst, Senior Systems Engineer, Service Desk Support Analyst, Senior UC Engineer, Senior Data Analyst and Senior Quality Assurance Test Engineer.

(Jt. Exh. 1 at Section 1.1.)

The parties never bargained the Salaried Unit and Hourly Unit collective-bargaining agreements together. (Tr. 92.) From the inception of the Salaried Unit, the collective-bargaining agreements for the two units and their respective administrations remained separate.

IV. HISTORY OF FLEX SCHEDULING WITHIN THE SALARIED UNIT

A. The Salaried Unit Had a Long History of Flexible Scheduling

The current Salaried Unit agreement, effective from July 1, 2018 through June 30, 2024, was signed by all parties by October 22, 2020. (Jt. Exh. 1.) While negotiating the Salaried Unit contract, Respondent and Local 743 did not discuss flexible scheduling. (e.g., Tr. 91.)

For many years, the Salaried Unit and the Hourly Unit had the same flexible schedule time. However, in 2019 contract negotiations, the Hourly Unit agreed to a contractual change to its flexible schedule, effective January 1, 2021. That change would narrow the start time for the Hourly Unit to 6:30 a.m. to 9:30 a.m. (R. Exh. 7.)

B. Provisions Regarding Scheduling in the Salaried Unit Agreement

The Salaried Unit's collective-bargaining agreement had no specific provision about the flexible starting times, which started in 2000. The agreement does not include specific working hours. (Tr. 94.) For many years the Salaried Unit's flexible starting times were in a window of 6:00 a.m. until 10:00 a.m. As the Salaried Unit traditionally worked a 35-hour week, with 30-minute lunches, the shift ended within the window of 1:30 p.m. to 6:00 p.m. (Tr. 45,)

Respondent decided that, in order to provide sufficient support to the organization, the Salaried Unit's scheduling should match that of the Hourly Unit. (Tr. 93.) Respondent contends its rights to change scheduling is covered by the Salaried Unit agreement's management rights clause:

> 6.1 The management of the Employer's operations and the direction of the work force, including, but not limited to: the right to plan, direct and control office operations; to hire, schedule and assign work to the employees; to determine what employee qualifications are necessary for the job; to determine the means, methods, process and schedules of work; to introduce new or improved equipment, facilities or methods; to add or discontinue services or processes; to determine the location of operations, the establishment of new operations or locations, and the continuance of the operations and the various operating departments; to discontinue jobs; to establish reasonable production standards and to maintain and improve efficiency, to transfer employees or to relieve employees from duties for justifiable reasons; to maintain order and to suspend, demote, discipline and discharge for proper cause, are the sole rights of the Employer, provided, however, that said powers shall be exercised in accordance with this Agreement.
>
> 6.2 This Agreement sets forth only the terms and conditions of employment with the Employer; consequently, nothing in this Agreement shall be deemed to be a guarantee of work or hours except as set forth herein or to be a contract of employment for individual employees.

(Jt. Exh. 1 at Section 6.)

The agreement contains language about pay for employees, except field service representatives, who work in excess of 35 hours per week and compensatory time off. (Jt. Exh. 1 at Sec. 22-23.) It contains specific language about holiday pay, vacation benefits, paid time off, and leave for school conferences and activities. The Salaried Unit agreement does not contain a "zipper" clause.

V. RESPONDENT NOTIFIES EMPLOYEES OF A PLAN TO CHANGE FLEXIBLE SCHEDULES AND LOCAL 743 RESPONDS

On December 7, 2020, Supervisor Heppe emailed the 10 employees in system engineering, which included both non-bargaining unit employees and bargaining unit employees in the Salaried Unit. He notified them that they would be subject to changes in the flex time starts from 6 a.m. to 10 a.m., narrowed to 6:30 a.m. to 9:30 a.m., effective January 1, 2021. Heppe's email explained that the earliest anyone could stop working would be 2:00 p.m. instead of 1:30 p.m. (Tr. 28-29, 34; GC Exhs. 2, 4.) Respondent informed the rest of the Salaried Unit employees through a town hall meeting. (Tr. 96.) A Salaried Unit employee forwarded the email to Local 743's negotiation team, including Brendan Crowley, a staff attorney for Local 743 and chief negotiator for the most recent Salaried Unit and Hourly Unit contracts. (Tr. 29-30, 43.; GC Exh. 2.) Respondent did not notify Local 743 about the change in scheduled hours.

On December 8, 2020, Crowley emailed a letter to Respondent Director of Human Resources Scott Robbins. (Tr. 47-49; Jt. Exh. 2.) Crowley expressed "dismay" that Local 743 found out of the planned change through employees instead of direct notice and asked for prior notice of changes in the future. Crowley continued:

> The Union is still reviewing the Parties' Collective Bargaining Agreement and bargaining history to determine if such change is even allowed by the Parties' Agreement. However, in an abundance of caution and to assure the union does not lose its right to bargain over the decision or effects of these changes, and without surrendering any arguments as a result of this letter, please accept this letter as our Union's demand to bargain over the employer's recently announced schedule changes for Salaried Bargaining Unit.
>
> As with any mandatory subject, please cease and desist from implementing this policy prior to bargaining with the affected employee's exclusive bargaining agent, until such time as the parties reach agreement or impasse.

(Jt. Exh. 2 at 2.)

Robbins forwarded the email to Respondent's in-house deputy counsel, Charles Lee. Robbins testified that he did not understand Crowley's letter was a demand to bargain because Crowley was reviewing the contract. (Tr. 98-99.) Upon review, Lee thought Crowley needed to review the collective-bargaining agreement further and only sent the December 8 letter "to preserve the union's right to request bargaining." (Tr. 112.) Lee dismissed the subject line of the email, "Salaried Unit -Union's Demand to Bargain," based upon the body of Crowley's letter (Tr. 112-113, 120-121; Jt. Exh. 2.)

Crowley searched for information to assist in interpreting the collective-bargaining agreement. He found none. On December 14, 2020, by email, Lee told Crowley that he assumed by this time Crowley reviewed the Salaried Unit agreement. Lee pointed out that, based upon the agreement's management rights provision, management believed it had the unilateral right to change the work hours. Lee invited Crowley to notify him if he had a different interpretation. (Tr. 49; Jt. Exh. 3.)

On December 15, 2020, Lee and Crowley discussed the matter by telephone. Crowley took no notes and later thought the conversation may have been split into 2 different calls. Crowley recalled that he told Lee that the term "schedule" was not clear. Crowley contends that this standard permitted bargaining over the effects of the managerial decision. (Tr. 51.) Lee told Crowley he would get back in touch with him. (Tr. 51.)

Lee sent a summary of this conversation to HR Director Robbins and others. In Lee's version, he and Crowley discussed the contract coverage standard under the District of Columbia Court of Appeals and the Seventh Circuit Court of Appeals. (Tr. 114.) Lee testified, based upon this email, that Crowley said management had the right to make the change but needed to bargain over the effects based upon *MV Transportation*,[4] in which the Board majority adopted the contract coverage standard for unilateral changes and rejected the long-held "clear and convincing" waiver standard. Lee contended that, under the Seventh Circuit and D.C. Circuit holdings, contract coverage applied to effects bargaining as well. Crowley contends that the Board law held otherwise. Lee reported Crowley changed his position. Crowley allegedly said that if the change only applied to those in the information technology department, management could make the change; however, if the change involved the entire Salaried Unit, then management must bargain the changes in flex time scheduling. (Tr. 115; R. Exh. 4.) Crowley allegedly said that negotiations

[4] 368 NLRB No. 66 (2019).

partially discussed work hours, which he later disputed and re-emphasized the need to negotiate the planned changes to work hours. (R. Exh. 4.)[5]

On December 15, 2020 after the telephone discussion, Lee sent Crowley an email: Lee confirmed that the work hours changed applied to the entire Salaried Unit and asked for any information to demonstrate that working hours were discussed during the previous negotiations. (Tr. 52-53; Jt. Exh. 4.) After Crowley sent his December 8 demand to bargain, he sent no further demand to bargain Respondent's decision or its effects. (Tr. 64; Jt. Exh. 2.)[6] At hearing Crowley testified that one of the definitions of the clause in question could refer to the flexible work schedule. (Tr. 67.)

The effects bargaining issues that Crowley wanted to negotiate included allowing the Salaried Unit employees more time to find childcare, or care for other family members. A bargaining unit member also indicated that traffic would be increasingly problematic because of the shift in times.

Respondent contends Local 743's letter was not clear that it was actually requesting to bargain about the changed schedules and the effects of the proposed changes. Another area of concern was clarification of the hours for the field services department due to their travel obligations. (Tr. 71-72.)

ANALYSIS

The complaint alleges that Respondent made a unilateral change without notification to the Union and Respondent failed to bargain the decision or its effects. In addressing these allegations, I present the applicable law and the analysis related to the particular allegations, along with Respondent's defenses.

I. APPLICABLE LAW

Section 8(d) of the Act requires an employer to provide the collective bargaining representative with notice and an opportunity to bargain before changing mandatory subjects of bargaining. *NBCUniversal Media, LLC*, 371 NLRB No. 5, slip op. at 7 (2021), citing *NLRB v. Katz*, 369 U.S. 736 (1962) and *Toledo Blade Co.*, 343 NLRB 385 (2004). Once the employer furnishes a meaningful opportunity to bargain, the union must pursue its bargaining rights. *Frontier Communications Corp.*, 370 NLRB No. 131, slip op. at 10 (2021), citing *Berklee College of Music*, 362 NLRB 1517, 1518 (2015).

An employer must bargain over material and substantial changes in wages, hours or terms and conditions of employment. *Northstar Memorial Group, LLC, d/b/a Skylawn Funeral Home*, 369 NLRB No. 145 (2020), citing *Fresno Bee*, 339 NLRB 1214 (2003). To establish a prima facie case for a Section 8(a)(5) unilateral change, General Counsel must demonstrate "the employer made a material and substantial change in a term of employment without negotiating with the union." *Fresno Bee*, 339 NLRB at 1214. Bad faith is not necessary to determine whether an

[5] In terms of events, the December 15 conversation is the only part of the facts that requires a credibility determination. The main point I take from the conversation is that Crowley told Lee that he wanted to bargain effects if Respondent intended to apply the change to the entire Salaried Unit.

[6] During the investigation Crowley testified that he was only seeking to bargain effects, not the decision itself. (Tr. 66.) However, General Counsel controls the case allegations, which include decisional bargaining and will be discussed in due course. (Tr. 68-70.)

employer made an unlawful unilateral change. *NBC Universal*, supra, citing *Katz*, 369 U.S. at 743 and 747.

A party contending that the employment condition is a past practice has the burden of proof to show the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Raytheon Network Centric Systems,* 365 NLRB No. 161, slip op. at 5, 8, etal. (2017); *Howard Industries, Inc*., 365 NLRB No. 4, slip op. at 3-4 (2016).

The employer may defend the allegation by demonstrating it was privileged to make the unilateral change. Reasons for defenses include: the change was not material, substantial and significant; the change was part of the past practice; or did not vary in kind or degree from what was previously customary. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11 (2019); *Raytheon*, 365 NLRB No. 161, supra.

Another defense is that the contractual language permitted the employer to enact the change without any further bargaining ("contract coverage"). *MV Transportation, Inc*., 368 NLRB No. 66, slip op. at 2, 11-12 (2019). If the contract indeed gives the employer such authority, the employer will not have violated Section 8(a)(5). *MV Transportation*, 368 NLRB No. 66, slip op. at 11. This standard uses the contract's plain language to determine whether the contract permitted an employer to act unilaterally. Id., slip op. at 2; *ABF Freight System, Inc.*, 369 NLRB No. 107, slip op. at 3 (2020) and cases cited therein. If the contract coverage standard is not met, the Board will continue to apply the traditional waiver standard to determine whether some combination of contractual language, bargaining history and past practice establishes that the union waived it right to bargain regarding a challenged unilateral change. *MV Transportation*, 368 NLRB No. 66, slip op. at 2 and fn. 7.

II. PARTIES' POSITIONS

General Counsel contends that Local 743 made a demand to bargain over the decision to change the flexible schedule times. In addition, Respondent should have bargained over the decision and the effects of the decision. The collective bargaining agreement did not include a specific provision about flexible working hours, so that contract language does not meet the contract coverage standard. (GC Br. at 9-10.) General Counsel further contends that *MV Transportation*, supra, should be overruled and the Board should return to the traditional "clear and unmistakable waiver" doctrine for unilateral changes, which was discussed in cases such as *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) and *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

Local 743 contends that *MV Transportation*, supra, fails to identify how effects bargaining should be handled under its adoption of the contract coverage standard. The history of the collective bargaining process between the parties also was under previous "clear and unmistakable" standard. (U Br. at 6.) Ultimately, the case facts show that the Board should revisit the doctrine it adopted in *MV Transportation*, supra. (U Br. at 7.)

Respondent contends Local 743 never clearly demanded to bargain its planned changes to the flexible shifts. Even so, the collective-bargaining agreement permitted its unilateral action to change shift starting and ending times. Nothing supported a "dichotomy" to bargain the decision versus the effects of the decision, resulting in no need to bargain effects of its decision.

III. DOES CONTRACT COVERAGE SHOW THAT THIS UNILATERAL CHANGE WAS UNLAWFUL?

A. *Work Schedules are a Mandatory Subject of Bargaining and Past Practice*

Work schedules and their changes are mandatory subjects of bargaining. *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, slip op. at 22-23 (2018); *Northwest Graphics, Inc.*, 342 NLRB 1288, 1297 (2004), enfd. 156 Fed. Appx. 331 (per curium) (D.C. Cir. 2005); *Paul Mueller Co.*, 332 NLRB 332, 334 (2000). Within work schedules, changes in shift starting times or ending times are material, substantial and significant. *Queen of the Valley Medical Center*, 368 NLRB No. 116, slip op. at 34 (2019), citing *Mitchellace, Inc.*, 321 NLRB 191, 195 (1996). Here, the windows for starting and ending times were changed, which is a material and substantial change. *Queen of the Valley*, supra.

The flexible shifts also constituted a past practice for the Salaried Unit employees. A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. *ABF Freight System, Inc.*, 369 NLRB No. 107, slip op. at 2 (2020). Also see *Northstar Memorial,* 369 NLRB No. 148, slip op. at 20, citing: *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353, 354 (2003), enfd. 112 Fed. Appx 65 (D.C. Cir. 2004); and, *Eugene Iovine, Inc.*, 329 NLRB 294, 297 (1999). The party asserting the existence of a past practice, here General Counsel, must establish the regularity and frequency specific to its circumstances. *General Die Casters, Inc.*, 359 NLRB 89, 90 (2012); *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). The existence of a past practice does not depend upon the contract language, but instead whether an employer's action "varied in kind and degree from what had been customary in the past." *ABF Freight System, Inc.*, 369 NLRB No. 107, slip op. at 2.

The parties had an established past practice for flexible scheduling in the Salaried Unit. Respondent does not dispute that the past practice granted employees the window of start times between 6 a.m. and 10 a.m. Although the hours were the same as the Hourly Unit until the latest Hourly Unit collective-bargaining agreement, the Salaried Unit's practice existed for years without break. Because Respondent and the Union separately negotiated and maintained collective-bargaining agreements for the Salaried and Hourly Units, the past practice is not indicative of permission for Respondent to change the Salaried Unit's terms and conditions of employment to match the Hourly Unit's contractually mandated shift start times.

B. The Union Sufficiently Conveyed Its Demands to Bargain

Respondent gave ineffective notice to Local 743 about the planned charge. Respondent gave preimplementation notice to the bargaining unit employees but not Local 743. Although Local 743 rapidly learned of Respondent's plans, this notice is considered ineffective. *Frontier Communications*, supra. Notice to employees is distinctly different than providing notice to the exclusive bargaining representative because the bargaining representative is the only party that has the right to negotiate and contract over terms and conditions of employment. *Bridon Cordage, Inc.,* 329 NLRB 258, 259 (1999).

Respondent contends that its communications with Local 743 do not demonstrate a clear demand to bargain. However, a union does not need to overwhelm an employer that it seriously wants to bargain. *General Electric Co.*, 296 NLRB 844, 855 (1989), enfd. 915 F.2d 738, reh'g denied (D.C. Cir. 1990).

On December 8, when Crowley sent the letter, he made a specific demand to bargain despite a confession that he had not reviewed all instances. Respondent contends this letter was

a "placeholder" but not a clear demand to bargain. (R. Br. at 10.) Lee also admitted that, on December 15, Crowley said if the change affected the entire Salaried Unit, he demanded to bargain. Respondent admitted that the schedule change affected the entire Salaried Unit, so Respondent was sufficiently notified that the Union expected to bargain, particularly effects based upon the December 15 conversation.

C. Respondent Was Privileged to Make The Change Under "Contract Coverage"

Respondent maintains it was privileged to make the change through the contract coverage standard. Under this analysis, the Board examines the collective-bargaining agreement's plain language to assess if the employer's action permitted the employer to act unilaterally. *Huber Specialty Hydrates, LLC*, 369 NLRB No. 32, slip op. at 3 (2020). The Board has the power to resolve contractual disputes when they relate to determination of an unfair labor practice. *Northstar Memorial Group*, 371 NLRB No. 145, slip op. at 19. In doing so, I use these guidelines:

> Assessment of the collective-bargaining agreement requires reasonable construction; interpretation is not a piecemeal effort but requires examination of the contract in its entirety. *Healthbridge Management, LLC*, 365 NLRB No. 37, slip op. fn. 25 (2017), enfd. 902 F.3d 37 (2d Cir. 2018). To do otherwise violates the long-standing principles of "accepted rules of contract interpretation." *Textron Puerto Rico*, 107 NLRB 583, 587-588 and fn. 5 (1953). Also see: *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956); *Knollwood Country Club*, 365 NLRB No. 22, fn. 8 (2017); *Capitol Trucking, Inc*., 246 NLRB 135, 140 (1979); *Alliance Mfg. Co*., 200 NLRB 697, 700 (1972).

Northstar Memorial Group, LLC, 369 NLRB No. 145, slip op. at 19. If the collective-bargaining agreement's language covers the issue, it permits the employer to act unilaterally: No violation of Section 8(a)(5) occurs. *Huber Specialty Hydrates*, 369 NLRB No. 32, slip op. at 3-4.

In *Huber Specialty Hydrates*, supra, slip op. at 2-3, the Board found that the management rights clause permitted the employer to change attendance policies because the plain wording covered any number of situations. The clause broadly granted the employer to "adopt reasonable rules and policies" with the language also granting the union allowed a 7-day period for input before implementation. The Board construed the management rights clause to broadly grant a change in the attendance policy without violating Section 8(a)(5).

The situation here, like *Huber*, supra, requires examination of the plain language in the management rights clause, particularly the term "schedule." General Counsel contends that the term "schedule" is insufficient to fit into the contract coverage requirements because the flex time provisions were never part of the collective-bargaining agreement. I disagree: The broadly written management rights clause provides that Respondent is vested with the right "to schedule." The term "schedule" can be a noun or a verb. Of the noun definitions applicable here, it can be:

- a procedural plan that indicates the time and sequence of each operation, e.g., finish on schedule
- a written or printed list, catalog or inventory
- a body of items to be deal with, like an agenda

www.merriam-webster.com/dictionary/schedule (last visited May 10, 2022).

As a transitive verb "schedule" is defined as: To appoint, assign, or designate for a fixed time; or, to place in a schedule or to make a schedule of. Id.

The Cambridge Dictionary defines "schedule" as "a list of planned activities or things to be done showing the times or dates when they are intended to happen or be done" or "a list of the times when events are planned to happen, for example the times when classes happen or when buses, etc. leave and arrive." https://dictionary.cambridge.org/us/dictionary/english/schedule (last visited May 10, 2022).

The plain definition of "schedule" includes the transitive verb definitions, to place in a schedule as well as assigning and designating fixed times. This plain language in the management rights clause vests Respondent with the rights to change schedules. *Enloe Medical Center v. NLRB*, 433 F.3d 834, 836 (D.C. Cir. 2005).

The language in the collective bargaining agreement here is unlike the situation addressed in *IBEW Local 43 v. NLRB*, 9 F.4th 63, 73 (2d Cir. 2021).[7] After the Second Circuit agreed that contract coverage was a sufficiently rational approach to assessing possible unilateral change, it found that the contract in question did not permit the employer the right to change work schedules. Language in the contract more specifically defined what hours and scheduling would be and reliance upon the non-specific language in the management rights clause was misplaced. Id. The court remanded the matter back to the Board because "it failed to meet the contractual prerequisites for doing so unilaterally." Id. at 73.

The language in the management rights clause here broadly covers scheduling without any other provisions that might contradict it. The Respondent shifted the start and ending hours within its right to schedule. Therefore, a contract coverage analysis shows Respondent did not violate Section 8(a)(5) by failing to notify and bargain with the Union about schedule change. I recommend that this portion of the complaint be dismissed.[8]

As to General Counsel's suggestion that the Board revert to the historical standard of a "clear and unmistakable" waiver, I am not at liberty to overrule Board precedent or anticipate any potential reversal of precedent.[9] *Western Cab Co.*, 365 NLRB no 78, slip op. at 1 n. 4 (2017), citing *Waco., Inc.*, 273 NLRB 746, 749 n. 14 (1984).

D. Respondent Was Obligated to Bargain Effects Under Current Board Law

Although an employer may not have a bargaining obligation over a management decision, it still may have a duty to bargain in a meaningful and timely manner about the effects on the bargaining unit employees. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981); *Columbia College Chicago*, 360 NLRB 1116, 1127 (2014). The effects are bargainable when they cause material, substantial and significant changes to the unit's working

[7] The Board's decision on remand is located at 371 NLRB No. 110 (June 22, 2022).

[8] Respondent also argues that the management rights clause also permits it to maintain and improve efficiency. (R. Br. at 16-17.) I find that it is not necessary to reach that issue as the term "schedule" is more specific for the purposes of this analysis.

[9] The Board recognizes that the circuit courts have split on whether the correct standard should be "contract coverage" versus the traditional "clear and unmistakable" standard. *MV Transportation, Inc.*, supra, at fn. 12. Also see *Columbia College Chicago v. NLRB*, 847 F.3d at 555 (Hamilton, concur) (although following Seventh Circuit precedent is correct in this decision, the Board presents strong argument for the "clear and unmistakable standard, but the split in circuits should be decided in a different forum).

conditions. *Columbia College Chicago*, 360 NLRB at 1127. An employer is required to provide sufficient "preimplementation notice of its decision in order to satisfy its effects-bargaining obligation." *Frontier Communications Corp.*, 370 NLRB No. 131, slip op. at 1 fn. 2, citing *800 River Road Operating Co., LLC d/b/a Care One at New Milford*, 369 NLRB No. 109, slip op. at 6 and fn.23 (2020) and *Willamette Tug & Barge Co.*, 300 NLRB 282, 282-283 (1990). As above, Local 743's demand to bargain was sufficient to put Respondent on notice that it wanted to bargain effects if Respondent intended to apply the change to the entire bargaining unit. Because Respondent indicated that it intended to do so, Respondent knew the consequences---that Local 743 wanted to bargain over the effects of the schedule changes.

Respondent also contends that the courts of appeals that were early adopters of the "contract coverage" doctrine also extend that logic to effects bargaining, meaning effects bargaining is precluded when the contract covers the issue in question. See, e.g.: *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005); *Columbia College Chicago v. NLRB*, 847 F.3d 547 (7th Cir. 2017).

The Board has not yet adopted the position of those courts on applying contract coverage to effects bargaining. See *MV Transportation*, supra. Nor did the Board take a position in the later *Columbia College Chicago*: There the Board accepted the Seventh Circuit's remand on effects bargaining as the law of the case, but not as a sea change on effects bargaining. On remand the Board stated that the Seventh and D.C. Circuit have taken positions on effects bargaining with contract coverage, which was open for consideration in a future case. *Columbia College Chicago*, 368 NLRB No. 86, n. 7 (2019).

Because the Board has not yet changed its position on effects bargaining, I am bound by current Board law. The Board's current position remains that an employer is required to bargain effects even when it is not required to bargain about the decision. *Good Samaritan Hospital,* 335 NLRB 901 (2001). The Board there decided that the collective-bargaining agreement permitted the employer to unilaterally change staffing matrices but found an obligation to bargain over the effects of the change: The union would have had to make a "clear and unmistakable" waiver of its rights to bargain over the effects. Id. at 902-903. As here, Crowley included effects bargaining about Respondent's intended change in shift times, which is not a waiver of a union's right to bargain. *General Electric*, 296 NLRB at 855. I therefore must find that Respondent violated Section 8(a)(5) by failing to bargain with the Union about the effects of the schedule changes.

CONCLUSIONS OF LAW

1. Respondent Central States, Southeast and Southwest Areas Health & Welfare and Pension Funds is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Director of Human Resources Management Scott Robbins and Deputy Counsel Charles Lee are Respondent's supervisors within the meaning of Section 2(11) of the Act and/or agents within the meaning of Section 2(13) of Act:

3. Charging Party Health Care, Professional, Technical, Office, Warehouse and Mail Order Employees Union, Local 743, affiliated with the International Brotherhood of Teamsters is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act (Salaried Unit):

All Field Service Representatives, Senior Field Service Representatives, Marketing Representatives, Field Service Analysts, Senior Field Service Analysts, Communications Analysts, Lead Communications Analysts, Sr. Communications Analysts, Voice Analysts, Senior Voice Analysts, Cost Control Analysts, Operations Analysts, PC User Liaison/Trainers, PC/LAN Systems Specialists, Control Analysts, Lead Control Analysts, Senior Control Analysts, Senior Production Support Coordinators, Business Support Analysts, PC/LAN Support Administrators, Senior PC/LAN Systems Specialists, Lead PC/LAN Systems Specialists, Programmer Analysts, Database Analysts, Lead Operations Analysts, Lead Programmer Analysts, Lead Voice Communication Analysts, Senior Database Analysts, Senior Data Administrators, Systems Programmers, Senior Programmer Analysts, Senior Systems Programmers, Lead Systems Programmers, Senior Business Support Analysts, Lead Business Support Analysts, Lead Database Administrators, Lead Database Analysts, Lead PC/LAN Support Administrators, Senior Operations Analysts, Union Service Team leaders, Information Systems Analysts, Net Developers, Senior Digital Solutions Engineers, IT Financial Analysts, Digital Solutions Engineers, Lead End User Technology Engineers, Lead Information Security Analysts, Senior Security Risk Analysts, Lead Network Engineers, Lead Systems Engineers, Lead UC Engineers, Lead Web Developers, Network Operations Specialists, Senior Net Developers, Senior Business Analysts, Senior End User Technology Engineers, Developer/Analysts, Senior Process Improvement Analysts, Senior Quality Assurance Analysts, Senior Service Desk Support Analysts, Senior Web Developers, Web Developer/QA Analysts, Senior Systems Engineers, Service Desk Support Analysts, Senior UC Engineers, Senior Data Analysts and Senior Quality Assurance Test Engineers.

5. At all material times, based upon Section 9(a) of the Act, Teamsters Local 743 has been the exclusive collective-bargaining representative of the bargaining unit described above.

6. On December 7, 2021 and continuing thereafter, Respondent violated Section 8(a)(5) of the Act when it failed to bargain the effects of its change in starting and ending flexible scheduling times for the Salaried Unit.

7. Respondent has not otherwise violated the Act.

REMEDY

Having found that Respondent violated the Act in certain respects, I shall recommend that it cease and desist from engaging in such conduct, take affirmative action to remedy its violations and post an appropriate notice. Respondent will be ordered to bargain with the Union concerning the effects of its decision to change the flexible shift starting and ending times for the Salaried Unit.

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:
    a. Failing and refusing to bargain with Teamsters Local 743 as the exclusive collective-bargaining representative of employees in the bargaining unit.

b. Failing and refusing to bargain with Teamsters Local 743 about the effects of its decision to change the Salaried Unit's starting and ending flexible schedule times.
c. In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. On request, bargain with the Union as the exclusive collective-bargaining representatives of the employees in the following appropriate unit (Salaried Unit) concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All Field Service Representatives, Senior Field Service Representatives, Marketing Representatives, Field Service Analysts, Senior Field Service Analysts, Communications Analysts, Lead Communications Analysts, Sr. Communications Analysts, Voice Analysts, Senior Voice Analysts, Cost Control Analysts, Operations Analysts, PC User Liaison/Trainers, PC/LAN Systems Specialists, Control Analysts, Lead Control Analysts, Senior Control Analysts, Senior Production Support Coordinators, Business Support Analysts, PC/LAN Support Administrators, Senior PC/LAN Systems Specialists, Lead PC/LAN Systems Specialists, Programmer Analysts, Database Analysts, Lead Operations Analysts, Lead Programmer Analysts, Lead Voice Communication Analysts, Senior Database Analysts, Senior Data Administrators, Systems Programmers, Senior Programmer Analysts, Senior Systems Programmers, Lead Systems Programmers, Senior Business Support Analysts, Lead Business Support Analysts, Lead Database Administrators, Lead Database Analysts, Lead PC/LAN Support Administrators, Senior Operations Analysts, Union Service Team leaders, Information Systems Analysts, Net Developers, Senior Digital Solutions Engineers, IT Financial Analysts, Digital Solutions Engineers, Lead End User Technology Engineers, Lead Information Security Analysts, Senior Security Risk Analysts, Lead Network Engineers, Lead Systems Engineers, Lead UC Engineers, Lead Web Developers, Network Operations Specialists, Senior Net Developers, Senior Business Analysts, Senior End User Technology Engineers, Developer/Analysts, Senior Process Improvement Analysts, Senior Quality Assurance Analysts, Senior Service Desk Support Analysts, Senior Web Developers, Web Developer/QA Analysts, Senior Systems Engineers, Service Desk Support Analysts, Senior UC Engineers, Senior Data Analysts and Senior Quality Assurance Test Engineers.

b. On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit concerning the effects of Respondent's decision to change the Salaried Unit's starting and ending flexible scheduling times.

c. Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and a file a report with the Regional Director of Region 13, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous placed, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since December 8, 2020.

f. Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[10] IF the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated: Washington, DC
June 24, 2022

Sharon Levinson Steckler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATION BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT unilaterally change flexible shift scheduling unless we first notify the Union and bargain the effects of the change if the Union makes a demand to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing changes in flexible shift scheduling, notify and, on request bargaining the effects of the changes with the Union as the exclusive collective-bargaining representative of our employees in the following Salaried Unit:

All Field Service Representatives, Senior Field Service Representatives, Marketing Representatives, Field Service Analysts, Senior Field Service Analysts, Communications Analysts, Lead Communications Analysts, Sr. Communications Analysts, Voice Analysts, Senior Voice Analysts, Cost Control Analysts, Operations Analysts, PC User Liaison/Trainers, PC/LAN Systems Specialists, Control Analysts, Lead Control Analysts, Senior Control Analysts, Senior Production Support Coordinators, Business Support Analysts, PC/LAN Support Administrators, Senior PC/LAN Systems Specialists, Lead PC/LAN Systems Specialists, Programmer Analysts, Database Analysts, Lead Operations Analysts, Lead Programmer Analysts, Lead Voice Communication Analysts, Senior Database Analysts, Senior Data Administrators, Systems Programmers, Senior Programmer Analysts, Senior Systems Programmers, Lead Systems Programmers, Senior Business Support Analysts, Lead Business Support Analysts, Lead Database Administrators, Lead Database Analysts, Lead PC/LAN Support Administrators, Senior Operations Analysts, Union Service Team leaders, Information Systems Analysts, Net Developers, Senior Digital Solutions Engineers, IT Financial Analysts, Digital Solutions Engineers, Lead End User Technology Engineers, Lead

Information Security Analysts, Senior Security Risk Analysts, Lead Network Engineers, Lead Systems Engineers, Lead UC Engineers, Lead Web Developers, Network Operations Specialists, Senior Net Developers, Senior Business Analysts, Senior End User Technology Engineers, Developer/Analysts, Senior Process Improvement Analysts, Senior Quality Assurance Analysts, Senior Service Desk Support Analysts, Senior Web Developers, Web Developer/QA Analysts, Senior Systems Engineers, Service Desk Support Analysts, Senior UC Engineers, Senior Data Analysts and Senior Quality Assurance Test Engineers.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH & WELFARE AND PENSION FUNDS
(EMPLOYER)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov
Dirksen Federal Building, 219 South Dearborn Street, Room 808, Chicago, IL 60604-1443
(312) 353-9158, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-277915 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Centralized Compliance Unit at complianceunit@nlrb.gov